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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JEFFREY CARL LUNGBERG,

Defendant and Appellant.

E037733

(Super.Ct.No. SWF 001142)

OPINION

APPEAL from the Superior Court of Riverside County. Rodney L. Walker,
Judge. Affirmed.

Patricia J. Ulibarri, under appointment by the Court of Appeal, for Defendant and
Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney
General, Gary W. Schons, Senior Assistant Attorney General, Lilia E. Garcia,
Supervising Deputy Attorney General, and Janelle Marie Boustany, Deputy Attorney
General, for Plaintiff and Respondent.

Defendant Jeffrey Carl Lungberg appeals from judgment entered following jury convictions arising from defendant molesting his stepdaughter (Jane Doe)¹ over a four-year period, beginning when she was about eight years old. Defendant's convictions for molesting Jane include five counts of forcible oral copulation (Pen. Code, § 269, subd. (a)(4)²; counts 1 through 5); one count of forcible sexual penetration (§§ 269, subd. (a)(5) and 289; count 6), and 51 counts of committing lewd acts by force or fear (§§ 288, subd. (b)(1); counts 7 through 57). The trial court sentenced defendant to 396 years to life in prison.

Defendant contends the trial court committed a series of evidentiary errors, including allowing evidence of pornographic website links; allowing the victim's videotaped statement that she did not know if defendant molested his other stepdaughters; allowing the victim's testimony she deeply believed in God; and reading to the jury defendant's wife's note advising defendant not to cooperate in taking a lie detector test or cooperate with the police. Defendant also complains the prosecutor committed four instances of prejudicial misconduct during closing argument, and that his counsel was ineffective for failing to object to the misconduct.

We reject these contentions, as well as defendant's cumulative error claim, and affirm the judgment.

¹ For purposes of ensuring the victim's anonymity, the trial court made a standing order to refer to the victim in this case as "Jane Doe."

² Unless otherwise noted, all statutory references are to the Penal Code.

1. Factual Background

Defendant's stepdaughter, Jane, was born in 1991. Jane's parents (referred to as "mother" and "father") divorced in 1996. That same year her father married Susan. Jane's mother met defendant in 1997, and married him in 1999. Mother and father shared a 50/50 every-other-week custody arrangement for Jane. The relationship between Jane's parents was strained at times.

Beginning in 1998, when Jane was about eight years old, defendant began sexually molesting her. The molestation continued for four years, until Jane was 11 years old, in 2002. Jane testified that defendant molested her in his and mother's bedroom every Tuesday night, at bedtime, while mother was at choir practice, and on other occasions when mother was gone. Jane estimated defendant touched her 100 times, one to two times a week, from 1998 to 2002.

The molestations consisted of mutual massaging, rubbing Jane's vagina with his penis, attempted penile vaginal and anal penetration, digital anal penetration, and oral copulation by Jane. Defendant put Vaseline on his penis. Every week or every other week, defendant also had Jane watch pornographic tapes of men and women having intercourse, and had Jane imitate them. Jane testified that defendant kept the pornographic tapes on his side of the bed in his nightstand. Defendant often played PlayStation video games with Jane, and told her the winner would get to do whatever he or she wanted for 15 minutes. Defendant usually won. When Jane did not want to do something, defendant would try to bribe her with money. He always paid her when she orally copulated him, which happened five times. When she orally copulated him, he put

oil that smelled like blueberries on his penis. The oil was in a blue bottle on mother's side of the bed.

Defendant told Jane not to tell mother because it was his and Jane's little secret. He told her, "Don't tell anyone or else," which she believed meant he would kill or seriously hurt her. One time defendant got mad at Jane and slapped her inner thigh when she did not want to orally copulate him. She had told him she wanted him to stop and things did not go right. Jane did not tell anyone about the molestation because she was afraid of what others would think of her and their reactions. She did not tell defendant to stop because she was afraid of him. She was afraid he would kill or seriously injure her. She thought her mother would not like her and her father would kill defendant and then have to go to jail.

Jane testified that in September 2002, she was "filled with the Holy Ghost" and knew she had to disclose the molestation. On September 29, 2002, she told her good friends, Lucas and Tiffany, about the molestation. She then told her maternal grandmother and her mother's brother, Uncle Randy, who was a sheriff's deputy. Her uncle told her he would tell her mother because Jane did not want to tell her. Her uncle told Jane to tell her father and her stepmother, who was an ordained minister and children's pastor. After Jane told them, her father and stepmother, Susan, called another pastor and her husband, who came over and discussed the matter. Then the police were called.

On October 30, 2002, the police searched defendant's home and found three computers, pornographic videotapes, blueberry massage oil, a book on sexual massage,

and Vaseline. The oil was found on a nightstand in the bedroom. There were also two videotapes providing instruction on sex in the bedroom and books on sex and massage. Vaseline was found on a nightstand. A handwritten note to defendant, from mother, was found by the computer desk. In the note, mother told defendant not to cooperate in taking a lie detector test or cooperate with the police.

Susan testified at trial concerning Jane's disclosure. An expert on child abuse accommodation syndrome (CAAS) testified as to how children who have been molested tend to behave. She also testified as to the impact a custody battle may have on a child, and that parents may influence their children to lie.

A computer forensic examiner, Henry Ong, testified that he examined three computers found in defendant's home and found numerous website links to pornographic sites, with about 50 percent of the sites having pictures of young girls.

Mother testified she and father had had disputes over custody and visitation. The disputes sometimes were bitter. She also stated that, when she was at choir practice from 8:00 to 10:00 p.m., on Tuesdays, defendant would watch Jane. Jane threw temper tantrums when mother did not let her go to choir practice with her. Those tantrums continued until 2002, when Jane disclosed the molestation. When mother found out about the molestation from Jane's grandmother, mother went to father's home. Jane appeared scared. Later, mother confronted defendant with Jane's accusations. Defendant became upset and started crying. Mother was skeptical at first. She thought it might be another custody matter. She still loved defendant and did not want it to be true.

Mother also testified defendant told her before they were married that he suffered from erectile dysfunction due to paralysis but they engaged in sexual activity once or twice a week. Mother was aware defendant had one pornographic tape. Mother used blueberry lubricant with defendant but not Vaseline. To mother's knowledge, none of the sexual items in defendant's and mother's bedroom had been shown to Jane but the bedroom was seldom locked.

Defendant briefly testified that he did not at any time molest or inappropriately touch or speak to Jane.

Defendant's first wife, D'Ann, to whom he was married from 1992 to 1998, testified two of her daughters and a son lived with her and defendant during their marriage. She was unaware of any inappropriate conduct by defendant. D'Ann's daughter, Nicole, testified she was alone with defendant many times while she lived with him. At the time, she was between 15 and 18 years old, and nothing inappropriate ever occurred.

2. Evidentiary Errors

Defendant contends the trial court committed various evidentiary errors which individually and cumulatively resulted in prejudicial error.

A. Standard of Review

We review the court's evidentiary rulings for abuse of discretion. (*People v. Williams* (1997) 16 Cal.4th 153, 197.) We must affirm a ruling if it is correct on any ground, regardless of the ground on which the court relied. (*People v. Herrera* (2000) 83 Cal.App.4th 46, 65.) Even if a ruling is error, reversal is only warranted where there has

been a miscarriage of justice, that is, where it is reasonably probable that if it had heard the evidence, the jury would have reached a result more favorable to defendant. (Evid. Code, § 354; *People v. Earp* (1999) 20 Cal.4th 826, 880.)

B. Evidence of Pornographic Website Links

Defendant contests the trial court's ruling admitting testimony by forensic computer expert, Henry Ong, regarding pornographic website links found on defendant's computers. Defendant claims the evidence was irrelevant and highly prejudicial. The evidence did not include any pornographic images or pictures.

During a pretrial hearing, defendant moved to exclude Ong's testimony concerning the pornographic website links found on defendant's computer. Defense counsel argued that, although the links had names inferring young female participants, he looked at some of the pornographic links and they did not involve teens or young girls. Such evidence was therefore not relevant. In addition, defendant argued the evidence was more prejudicial than probative since the websites do not contain child pornography and there were no allegations that the victim was required to look at the computer pornography.

The prosecutor argued Ong's testimony concerning the pornography links was relevant in showing that whoever was using the computer seized from defendant's home (most likely defendant) made a concerted effort to eliminate all pornography on the computer. The evidence also showed that defendant was interested in young girls. Ong found the links on the computer but the actual down-loaded photographs and sites no longer existed. Ong also found weekly emails delivered to defendant's Yahoo account

which were teen-oriented. The prosecutor also argued the pornography evidence was probative in refuting defendant's claims that he had a sexual dysfunction and was not able to perform sexually.

The court noted the evidence was very prejudicial and weighed this against its probative value, noting that the People were arguing that the evidence was indicative of defendant's interest in sex with young girls. The court concluded that before it could determine whether the evidence was sufficiently probative to outweigh its prejudicial nature, the court needed to see the evidence and hear Ong's proposed testimony.

Later, during the trial, the prosecutor requested the court to revisit the issue, arguing the website-links evidence showed defendant's sexual intent. Defendant objected, arguing the websites automatically loop the recipient into two or three additional websites. Thus, the website links are not necessarily evidence of websites selected by the recipient. Also, the website names do not necessarily reflect the actual website content.

The court conducted an Evidence Code section 402 hearing during which Ong stated he could establish that the person using an email account in defendant's name had accessed hundreds of pornographic websites between 1999 and 2001, 50 percent of which involved young teens or girls. Ong checked some of the websites. They showed pornographic pictures of purportedly young teens, in which it was apparent that some of the females were actually older but were pretending to be underage, young teens. Ong showed the court some of the printed pictures.

Ong further stated that the computer user (defendant) subscribed to a daily email pornography picture site, which provided some of the young teen pornography links found on the computer. There were a lot of sites with the word “teen” or “Lolita.” There was evidence of pornography on defendant’s computers in a format that could not be viewed by someone who did not have expertise in computers. Ong concluded defendant had computer expertise. He used to work for a company, cleaning or sanitizing used computer hard drives. Ong testified that he could determine whether the computer user requested the material on the computer or received it as unsolicited Spam. There was also evidence the computer user had regularly sanitized the computers, but on occasion forgot to do so.

Defendant argued that the website-link evidence was irrelevant because it pertained to teens and there are significant differences between teens and prepubescent girls such as the victim, who was eight to 11 years old at the time of the alleged sexual abuse. In addition, there was insufficient evidence defendant accessed the websites.

The trial court ruled the website evidence was relevant and its probative value outweighed its prejudicial nature under Evidence Code section 352. The court further ruled that it would not limit the evidence to just the young girl website links because doing so would prejudice defendant by improperly focusing the jury only on the young girl or teen websites when in fact, 50 percent of the pornographic websites did not involve young girls or teens. Thereafter, Ong testified at trial to finding website links on defendant’s computers that accessed young girl and teen pornographic websites.

Ong's testimony concerning the pornography website links and the apparent sanitizing of pornography on defendant's three computers suggests defendant possessed a prurient interest in sex involving underage girls. This was clearly relevant to the sexual abuse charges against defendant. The trial court's conclusion was not the result of arbitrary, capricious, or whimsical thinking and was within the bounds of reason. The record reflects the court carefully considered and weighed the prejudicial and probative nature of the evidence, and reasonably concluded that the probative nature of the website-links evidence outweighed its prejudicial nature.

Rejecting the defendant's Evidence Code section 352 challenge, our high court in *People v. Memro* (1995) 11 Cal.4th 786, held that photographs of young boys, some of which were pornographic, were admissible as probative of the defendant's intent to commit a lewd or lascivious act with the victim, who was a young boy. (*Id.* at p. 865.) The court explained that, "Although not all were sexually explicit in the abstract, the photographs, presented in the context of defendant's possession of them, yielded evidence from which the jury could infer that he had a sexual attraction to young boys and intended to act on that attraction." (*Id.* at pp. 864-865; see also *People v. Yovanov* (1999) 69 Cal.App.4th 392, 406.)

Defendant argues *Memro* is distinguishable because, in the instant case, none of the websites were of prepubescent females, and thus the evidence was irrelevant. Furthermore, Ong was only able to testify to the contents of a small portion of the websites, and of those websites he observed, the websites showed women posing as

young teens, as opposed to prepubescent females. The evidence was thus irrelevant and more prejudicial than probative.

We disagree. The trial court did not abuse its discretion in finding that Ong's testimony concerning the pornography website links was more probative than prejudicial. While some of the evidence pertained to adult and teen pornography, there was also evidence of young girl pornography. Ong testified that he found links or access in 1999 to different sites, which included adult and little girl porn. He also found porn sites in which petite, young Asian women posed as girls, with their hair in pony tails or pig tails.

Ong's testimony provided sufficient evidence tying defendant to the computers found in his home and established that it was highly probable that he was the one accessing the pornography sites, many of which were used by defendant to view pornography of females who appeared to be girls or young teens. This showed that defendant had a sexual attraction to young girls and intended to act on that attraction. (*Memro, supra*, 11 Cal.4th at p. 865.) Furthermore, the evidence was not highly inflammatory since the jury was not shown any pornographic images. The trial court did not commit evidentiary error in allowing Ong to testify concerning pornographic website links found on defendants' computers.

C. Prior Bad Acts

Defendant challenges the admission of a statement by Jane made during a recorded interview taken on October 1, 2002. During the interview, a child abuse counselor with the Riverside Child Assessment Team (RCAT) asked Jane if defendant had other daughters. Jane responded, "Well he was married to this one woman, um he

was like 23 years old with him then. And he had children and I don't know if he did that to em, her two daughters."

Defendant claims this statement by Jane inferred that he had committed sexual crimes with his other stepdaughters, and therefore the trial court should have either redacted the statement before allowing the jury to hear the RCAT interview or should have excluded the entire interview.

(1) Procedural and Factual Background

Prior to the trial, defendant moved in limine to present testimony by Nicole, defendant's stepdaughter by his first wife. It was anticipated Nicole would testify that she lived with defendant when she was 10 years old, until she was 12 or 13 years old. While living with him, defendant did not sexually abuse her. Defense counsel argued that under *People v. Stoll* (1989) 49 Cal.3d 1136, defendant could present favorable character evidence showing that he did not have a propensity to abuse young, prepubescent girls.

The trial court responded that *Stoll* was distinguishable because it involved expert opinion showing that the defendant exhibited deviant behaviors. The trial court noted the evidence was not character evidence. Rather, it was testimony that certain acts did not occur. The court concluded Nicole's testimony that defendant did not act inappropriately when he was with her was therefore irrelevant. The court denied defendant's request without prejudice to reconsidering it during the trial.

During the trial, out of the presence of the jurors, defendant requested the court to revisit his request that Nicole testify that defendant did not exhibit any deviant sexual

behavior while he lived with her. Defendant noted that the prosecution intended to play for the jury Jane's RCAT videotaped interview in which Jane inferred that defendant may have sexually abused Nicole. Nicole's testimony that she was not sexually abused would corroborate defendant's testimony that he had never sexually abused any child.

The trial court suggested simply redacting the objectionable statement. The prosecutor said he did not want to delay his case by taking the time to redact if from the recorded RCAT interview. He indicated he would rather withdraw his objection to Nicole testifying and address the issue through cross-examining her. The court noted that defendant's objection to the videotaped statement should have been raised before trial. Defense counsel stated he did not initially object to it because he thought, and continued to believe, the RCAT videotaped interview should be presented to the jury. He added that he could address Jane's RCAT comment by having Nicole briefly testify concerning defendant's conduct.

The court concluded the statement was a gratuitous comment and served no purpose, although it raised the possibility defendant's stepdaughters may have been exposed to sexual abuse. The court agreed to allow the unedited RCAT videotaped interview and to allow defendant to thereafter put Nicole on the stand for the purpose of briefly questioning her on whether defendant had sexually abused her. Jane's videotaped interview was played for the jury. Defendant did not object. Later in the trial defense counsel called Nicole to the stand. She testified that she lived with defendant for about five years, when she was 15 to 18 years old. There were times when she was alone with defendant. At no time did anything "inappropriate" occur between defendant and her.

(2) Discussion

Defendant argues that Jane's RCAT statement, that she did not know if defendant molested his other stepdaughters, constitutes inadmissible evidence of prior bad acts.

Evidence Code section 1101, subdivision (a), states: "Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of *specific instances of his or her conduct*) is inadmissible when offered to prove his or her conduct on a specified occasion." (Italics added; see also *People v. Ewoldt* (1994) 7 Cal.4th 380, 393.)

Here, the statement in question was not opinion testimony or evidence of prior bad acts, and any inference of bad acts was purely speculative and unfounded since Jane said she did not know if defendant committed any inappropriate conduct with his two other stepdaughters. While the statement could have been redacted, there was no abuse of discretion in not doing so mid-trial. Had defendant timely objected before trial to the statement, no doubt the trial court would have ordered the statement redacted. However, under the instant circumstances, in which defendant waited until mid-trial to object and the court permitted Nicole to testify that defendant had not sexually abused her, there was no abuse of discretion or prejudicial error in allowing the statement. In addition, defendant had the opportunity to cross-examine Jane concerning her RCAT statement. Furthermore, Jane did not state defendant had sexually abused the other stepdaughters. She merely said she did not know. There was thus no evidence of any prior bad acts.

Even if we assume the trial court erred in not redacting the particular RCAT statement, the error was harmless. Defendant contends the admission of Jane's RCAT statement constitutes prejudicial error because it raised an inference of sexual propensity, which was not cured by allowing Nicole's limited testimony. We disagree. Jane's statement was relatively innocuous and brief. Any inference of bad acts was so tenuous and speculative that it is highly unlikely that the jury relied upon it in deciding the case. Thus, a result more favorable to defendant was not reasonably probable.

Defendant argues that the trial court compounded the error in allowing Jane's RCAT statement by limiting defense counsel's examination of Nicole. The court limited examination of Nicole to questioning her solely on whether defendant sexually abused her. The court indicated it was concerned about Nicole's testimony opening up a Pandora's Box of potential propensity evidence thereby resulting in a mini-trial concerning other possible sexual conduct and contacts. If Nicole happened to testify she or her siblings were molested, the testimony would be extremely damaging and prejudicial to defendant. Then the court would have to allow additional evidence on the sexual misconduct and cross-examination.

The court noted that, although redacting the statement would resolve the problem, this would delay the trial; defendant should have objected to the statement before the trial. By limiting Nicole's testimony, the court was attempting to prevent defendant from being prejudiced by unanticipated testimony that might be harmful to defendant's defense.

The court explained that delaying the trial further, in order to redact the statement, might result in a mistrial because the judge was going to be gone the following week. As a consequence, the court permitted Nicole to testify only for purposes of refuting any possible negative inference that could be made from Jane's RCAT statement concerning defendant's other stepchildren.

Defendant's reliance on *Stoll*, *supra*, 49 Cal.3d 1138, and *People v. McAlpin* (1991) 53 Cal.3d 1289, for the proposition the trial court should not have restricted defense counsel's examination of Nicole is misplaced. Our court in *Stoll* held that character evidence, consisting of expert opinion testimony that the defendant is not a sexual deviant, was permissible in a child molestation case. (*Stoll*, *supra*, at pp. 1152-1155.) In *McAlpin*, a child sexual molestation case, our high court extended *Stoll* to lay witness testimony, holding that a lay witness could testify that the defendant was not a sexual deviant, but such opinion testimony must be based on the witness's own observations of the defendant's conduct with children. (*McAlpin*, *supra*, 53 Cal.3d at p. 1309.)

Stoll and *McAlpin* are inapposite. Unlike in *Stoll*, Nicole was not testifying as an expert witness as to whether defendant was a sexual deviant. Although, as in *McAlpin*, Nicole was a lay witness testifying from personal experience, unlike in *McAlpin* she was in fact permitted to testify as to whether defendant sexually abused her. Defendant was permitted to ask any questions directly related to the issue of whether defendant molested or attempted to molest Nicole. The court emphasized it wanted the questioning brief but did not preclude any specific questions.

Defendant complains the court should have permitted defense counsel to ask Nicole more detailed questions, such as how often Nicole was with defendant, whether it was on a daily basis, how often her mother was absent, whether Nicole's sister, Colleen, was also present when their mother was gone, whether defendant did the primary parenting, and what, if any, types of activities the children engaged in with defendant.

But at trial, defense counsel did not request to ask these additional questions. Defense counsel asked if he could ask how old Nicole was at the time. In response, the court explained that it wanted defense counsel only to ask four or five questions basically designed to get to the ultimate question of whether, during the time Nicole lived with defendant, defendant molested her or attempted to do so. Defense counsel did not object to this or ask if he could ask any of the questions he now claims he should have been permitted to ask.

Under these circumstances, there was no abuse of discretion or prejudicial error in the manner in which the court limited defense counsel's examination of Nicole.

D. Jane's Testimony Regarding Her Belief in God

Defendant contends the trial court abused its discretion in allowing Jane to testify concerning her deep belief in God. He claims the testimony was unnecessarily cumulative, and was inappropriately used to bolster Jane's credibility by attempting to show that, because Jane was deeply religious, she would not lie.

During Jane's testimony, the prosecutor asked her questions about her belief in God. On several occasions, defense counsel objected, and the trial court overruled the objections.

Evidence Code section 789 states: “Evidence of his religious belief or lack thereof is inadmissible to attack or support the credibility of a witness.” In the instant case Jane’s testimony concerning her belief in God was relevant to establishing Jane’s motivation for finally disclosing that defendant had sexually abused her. Throughout the trial there was evidence that Jane, father, and Susan were devout Christians. Defendant did not object to most of this evidence.

For instance, Susan testified that Jane told her she had been molested on a Sunday afternoon, after Susan and her family had spent most of the day attending two church services. Susan noted that she and Jane’s father were leaders in the church. She was an Ordained Minister and children’s pastor, and Jane’s father was a Pastor’s assistant. Jane assisted in the nursery. According to Susan, Jane always had liked church, and went to a Christian school.

Jane testified that for the past four years she had been involved in church activities, including helping with the children and singing in the choir. During the past four years she had been going to a Christian church, and attended school there as well. On the day she reported the molestation, she and her stepmother had just gotten back from church in the afternoon. They had been going to a second church for about a year. She had been baptized at the church in June, the year before. Jane testified that she was “filled with the Holy Ghost” and “the Holy Spirit kept telling me, ‘You have to tell about this. Lucas and Tyffani will help you. Just tell.’” Lucas and Tyffani were good friends who had told her they had been molested. Jane told Lucas and Tyffani that defendant molested her for four years.

Defendant did not object to any of this testimony which revealed Jane's and her family's belief in God. Defendant only objected when Jane was asked if her belief in God was important to her or "deep," or when Jane and mother were asked when Jane's belief in God increased in intensity.

For instance, defendant objected during the following examination of Jane:

"Q. You said you're filled with the Holy Ghost the Holy Spirit?

"A. Yes.

"Q. Do you consider yourself to be a religious person?

"A. No, I'm not religious.

"Q. What do you mean?

"A. Religious is a certain way of doing things that don't really – in our – our pastor teaches us religion is basically evil, it doesn't do anything to help us at all.

"Q. Really?

"A. All we have to – religion asks for a certain way of doing things, to talk to God. But we can just go up and pray to God.

"Q. So by not believing or not following religion kind of cuts out the middleman?

"A. What do you mean by that? [¶] . . . [¶]

"Q. . . . With your faith, you believe in God?

"A. Yes.

"Q. Very, very deeply?

"A. Yes.

"Q. How long has it been that you've really had this deep belief in God?"

At this point, for the first time, defense counsel objected to questioning concerning Jane's religious beliefs. Up to that point, defense counsel had not objected to testimony concerning Jane's or her family's religious beliefs or involvement in the church. Out of the presence of the jury, Jane explained to the court that she had been in many different churches. The court told the prosecutor to rephrase his last question and continue. He did so:

"Q. In listening to you talk today, it sounds like . . . God is very important to you?

"A. Yes."

Defense counsel again objected and the court overruled the objection. When defense counsel asked to be heard, the court said it would hear him at some point later on, and overruled the objection. Defense counsel stated he wished to object to the line of questioning. The court noted his objection.

The prosecutor continued examination:

"Q. As important as it is for you now, was it the same way back in September of 2002?

"A. Yes.

"Q. How long before that period, when you told your Uncle Randy and everybody else – how long before that was it that God was so important to you like He is today?

"[Defense counsel]: Objection.

"THE WITNESS: About a year before.

"[Defense counsel]: Irrelevant.

"THE COURT: Say the answer.

"THE WITNESS: About a year before.

“THE COURT: The objection is overruled. The answer will stand. We’re getting pretty close to a time we need to stop this line, Mr. Lafferty [defense counsel].”

Defense counsel then moved on to asking Jane about when she told her friends, grandmother, Uncle Randy, Susan, father, and mother that defendant had molested her. Jane testified that, while she and Susan were discussing the molestation, her father asked what was going on. Her stepmother told him to “Go in the office and pray.” He returned a little later, and Jane’s stepmother again told him to leave and pray. A little later, Susan and Jane told Jane’s father about the molestation. They then called their church pastors, who came over and were told about the molestation.

Later in the trial, out of the presence of the jury, defense counsel noted, for purposes of making the record clear, that defendant reasserted his previous objection, stating “I will not expound on the objection I made as far as religion.” The court responded that it understood defendant’s objection. The court acknowledged that it was inappropriate to bolster witness testimony by showing the witness is devoutly religious or believes in God. The court, however, stated that the religion-related evidence was admitted for other reasons “[t]hat had to do with the statements of prior witnesses, and to a lesser extent the credibility of this witness [Jane].” The court noted that for these reasons, it told the prosecutor to stop the line of questioning concerning Jane’s religious beliefs, and the prosecutor did so. The prosecutor added that the testimony was intended to show why Jane disclosed the molestation.

Later in the trial, at the end of mother’s testimony, the prosecutor on redirect examination asked mother if she was familiar with Jane’s “strong faith in God.” Mother

said she was. When asked if this was something new in Jane's life, which had occurred before she disclosed the molestation, defense counsel objected as irrelevant. The court overruled the objection. Mother responded that Jane was in the process of becoming more religious when she disclosed the molestation. When Jane became a nondenominational Christian, her religious beliefs became much more intense and focused.

While evidence of a witness's religious beliefs is inadmissible to support the witness's credibility (Evid. Code, § 789), here much of the testimony defendant objected to was relevant to the issue of Jane's motivation for disclosing the molestation. There was evidence that within a year before Jane disclosed the molestation, she became more intensely religious and this prompted her to disclose the molestation after years of concealing it, despite her fear of doing so. The court thus did not abuse its discretion in allowing testimony relating to Jane's religious beliefs. Furthermore, the court appropriately instructed the prosecutor to cease the line of questioning when it became apparent that any further questioning on the subject was cumulative, unnecessary, and potentially prejudicial.

The record also shows that, before defense counsel objected to the prosecutor questioning Jane regarding her belief in God, there was already an abundance of evidence that Jane and her family believed in God and were very involved in their church. Jane's testimony acknowledging her deep belief in God merely confirmed the obvious. Therefore, even assuming the court erred in allowing the testimony to which defendant

objected, it is not reasonably probable the jury would have reached a more favorable result. (*People v. Watson* (1956) 46 Cal.2d 818, 826.)

E. The Handwritten Note

Defendant contends the trial court abused its discretion in admitting into evidence a handwritten note by mother. Police Officer Bruin found the note in defendant's bedroom, by one of defendant's computers, three days after Jane reported the molestation. The note stated: "Jeff, don't cooperate with a lie detector test. Don't cooperate with the police. Do they think it happened? Do they have evidence? She said it has been going on since she was eight years old."

During the trial, Bruin testified he found the note while searching defendant's bedroom. Defense counsel objected to "any further questioning on this line," and asked to be heard. The reporter's transcript indicates a discussion was held off the record, but there is no record of the discussion. The reporter's transcript states that after the unrecorded discussion, the court overruled defendant's objection and permitted the prosecutor to inquire further. The prosecutor then asked Bruin to read to the jury the note. Bruin did so.

After completion of Bruin's testimony, the court permitted defense counsel to make a record, out of the presence of the jury, as to his objection to Bruin's testimony concerning the handwritten note. Defense counsel stated that he objected to the questioning concerning the note based on lack of foundation, lack of relevance, and prejudicial impact. Defendant argued the note was prejudicial because it mentioned a lie

detector test and told defendant not to cooperate with the police. The court responded that the note might raise consciousness of guilt.

On appeal, defendant argues the note was inadmissible because it was irrelevant, provided cumulative evidence, implicated his constitutional rights, and was more prejudicial than probative. The basis for defendant's lack of foundation objection was eliminated during the trial by mother authenticating the note through testimony that she wrote the note to defendant after talking to Uncle Randy.

Defendant claims the note added nothing to the key issues of whether defendant committed the charged molestation and Jane's credibility. And even if the note were used to show consciousness of guilt, the evidence was merely cumulative and unnecessary.

Also, the note suggested that he had been offered a lie detector test, he had refused to cooperate with the police, and that if he were innocent, he would have taken the lie detector test and cooperated. Defendant claims these inferences were exacerbated by Bruin's testimony that a criminal defendant has a constitutional right not to cooperate.

In arguing the note was prejudicial, defendant asserts that the case against him was weak. He notes that there was motivation for Jane falsely accusing defendant of molestation. She was caught in the middle of a bitter child custody dispute, with her parents sharing 50/50 custody of her. According to Susan, Jane had always wanted to live with father and Susan. In addition, there was evidence it was unlikely defendant committed the charged offenses because he suffered from erectile dysfunction due to paralysis. Also, he had no criminal record.

Under Evidence Code section 351.1, subdivision (a), the results of a polygraph test, the opinion of a polygraph examiner, or any reference to the offer or refusal to take a polygraph test “shall not be admitted into evidence in any criminal proceeding . . . unless all parties stipulate to the admission of such results.”

Mother’s note raises the possibility that defendant might have been asked to take a lie detector test and refused to do so. Nevertheless, we are not persuaded that reading the handwritten note to the jury constituted prejudicial error. Any inference from the statement was speculative since there was no evidence as to whether defendant was requested to take a polygraph test or the results of any such test, and the court instructed the jury not to be influenced by conjecture. (CALJIC No. 1.00.) Furthermore, Bruin testified that under the Constitution defendant was not required to take a lie detector test.

While there should not have been any mention of a lie detector test, it is not reasonably probable that had her note not been read to the jury, the jury would have reached a result more favorable to defendant. (*Watson, supra*, 46 Cal.2d 818, 826.)

The other statements in the note were admissible to establish that mother and defendant had discussed the molestation accusations and were contemplating how defendant should respond. The note also created an inference of consciousness of guilt, albeit tenuous at best.

Furthermore, the note was not particularly prejudicial as a whole since it was written by mother, not defendant, and consisted of her own suggestions and concerns. We thus conclude that, even if the court erred in reading the note to the jury, it was harmless error. (*Watson, supra*, 46 Cal.2d at p. 826.)

3. Prosecutor Misconduct

Defendant contends the prosecutor committed four acts of misconduct during closing argument, and his counsel was ineffective for failing to object to the misconduct.

We note preliminarily that defendant failed to object in the trial court to any of the misconduct to which he complains on appeal. Accordingly, he has not preserved the claims for appeal. Nevertheless, in response to his claim that he was denied effective assistance of counsel (IAC) when his attorney failed to object, we will address defendant's assertions on the merits to the extent necessary to decide the ineffective assistance claim. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1155; *People v. Osband* (1996) 13 Cal.4th 622, 719.)

A. Applicable Legal Authority

Prosecutorial misconduct must be so egregious that it infects the trial with unfairness that makes the resulting conviction a denial of due process. (*People v. Padilla* (1995) 11 Cal.4th 891, 939, overruled on other grounds in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.) "Prosecutorial misconduct involves the use of deceptive or reprehensible methods in an effort to persuade the jury [citation] or actions so egregious as to infect the trial with unfairness [citation]." (*People v. Carter* (2003) 30 Cal.4th 1166, 1207.)

Prosecuting attorneys making closing arguments are afforded wide latitude in descriptive comment. (*People v. Williams* (1997) 16 Cal.4th 153, 221; *People v. Gionis* (1995) 9 Cal.4th 1196, 1216-1217; *People v. Price* (1991) 1 Cal.4th 324, 454-455; see also 5 Witkin & Epstein, Cal. Criminal Law (2d ed. 1989) § 2912, pp. 3566-3568 and

1999 supp., pp. 255-256.) When a prosecutorial misconduct claim focuses on comments made by the prosecutor to the jury, “the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.” (*People v. Morales* (2001) 25 Cal.4th 34, 44.)

B. Closing Argument Regarding Jane’s Belief in God

Defendant complains the prosecutor engaged in impermissible witness vouching during closing argument by commenting on Jane’s deep belief in God. Defendant claims such comments were made for the purpose of bolstering Jane’s credibility and inflaming the jury’s passions and prejudices.

Defendant objects to the following argument by the prosecutor: “There is another thing I wanted to touch on quickly. I asked her, ‘(Jane), why, then, did you say something?’ I think her words were, ‘I felt the Holy Ghost in me or the Holy Spirit.’ And then she gave us some of her feelings, thoughts, opinions on where she is in her life with God. [¶] *And she had an interesting conversation with me about religion. I certainly didn’t mean to mock her when I kind of laughed, but I am listening to this 13-year-old girl talk about things that people have been studying this information, this material for years, debate about, and all that really means nothing except for this, this little girl, as she was when she was 11, and at least a year prior to that, felt like God was important in her life, was something that moved her life, that drove her life. Compelled her to do something on this date when her two friends brought up the subject of molestation. [¶] Now I am not saying that people that worship one faith or another are going to be anymore truthful than anyone else. But I am telling you this little girl*

believed it important. Keep that in mind when counsel suggests – because the only thing he did at this point is suggest she is a liar. And what role that faith in her life made and how manipulative and diabolical she would have had to be to concoct such a huge version of events. [¶] When you are looking at what she said and how she said it, again, what will – what role God played in her life. For her that was important.”³

Defendant, in particular, objects to the prosecutor’s statements that Jane “had an interesting conversation” with the prosecutor about religion and “people have been studying this information, this material for years.” These statements are ambiguous. It is unclear whether the prosecutor is referring to a conversation outside the court or to the prosecutor’s examination of Jane at trial. In either instance, these statements are not so egregious or deceptive to constitute prosecutorial misconduct (*Carter, supra*, 30 Cal.4th at p. 1207), nor was there sufficient prejudice to constitute IAC (*People v. Burgener* (2003) 29 Cal.4th 833, 880).

The remainder of the prosecutor’s argument concerning Jane’s belief in God also does not constitute prejudicial misconduct or IAC. The prosecutor’s statements were aimed at arguing that, after four years of being molested, Jane’s increasingly strong belief in God compelled Jane to disclose the molestation. This was in response to defendant’s claim that Jane simply made up the accusations. To minimize or eliminate any misconception that the prosecutor was suggesting the jury should conclude Jane was

³ The italics were added to the quoted language by defendant in his appellant’s opening brief.

truthful simply because of her faith, the prosecutor noted that he was not claiming that people who “worship one faith or another are going to be any more truthful than anyone else.” Rather, the prosecutor urged the jury to find that Jane’s increasingly deep belief in God motivated her to disclose the molestation. The prosecutor was simply arguing what the evidence showed: Jane’s religion was important to her and had a significant impact on her conduct; in particular, it compelled her to disclose the molestation.

In the context of the evidence presented in this case and the circumstances that led to Jane disclosing the molestation, the prosecutor’s argument concerning Jane’s belief in God does not constitute prejudicial misconduct or IAC.

C. Failure to Take a Lie Detector Test

Defendant complains that the prosecutor stated during closing argument that defendant failed to take a lie detector test and cooperate with the police. Defendant argues this was prejudicial prosecutorial misconduct because these facts were not in evidence.

The prosecutor argued the following: “[Defendant] knew very well what was going on. What didn’t you hear? No contact with the police during the three-day span. No phone call. Didn’t go to the station to talk to him. Not that night, not Monday, not Tuesday, not Wednesday. He knows that little girl says he has molested her. So he waits. [¶] When the police are there, on the 2nd, in his complex, his trailer park, he drives in and goes past them. You heard them tell about there was a visual observation. The car, obviously a police car, two detectives sitting in the car, you can imagine that is the only thing on the man’s mind over that three-day period. [¶] What does he do? He

doesn't go home. He doesn't go home. He leaves the parking lot. Where he is ultimately pulled over. [¶] We know he and [mother] were talking about this information. *Jeff didn't cooperate with the lie detector test. Didn't cooperate with the police.* You will have that as evidence.”⁴

The record shows that the prosecutor misstated the evidence. The italicized language mischaracterizes the following statements in mother's handwritten note in which she told defendant: “[D]on't cooperate with a lie detector test. Don't cooperate with the police.” There was no evidence that anyone requested defendant to take a lie detector test, that he refused to cooperate in taking the test, or that he refused to cooperate with the police. Defendant argues this misleading argument implicated his Fifth Amendment right to remain silent. Defendant had a right not to cooperate with the police and not to take a lie detector test.

We must thus consider whether defendant's trial attorney's failure to object to the misstatements constitutes IAC. To demonstrate ineffective assistance of counsel, defendant must show that “counsel's action was, objectively considered, both deficient under prevailing professional norms and prejudicial. [Citation.] To establish prejudice, a defendant must show a reasonable probability that, but for counsel's failings, the result of the proceeding would have been more favorable to the defendant. [Citation.]” (*People v. Burgener, supra*, 29 Cal.4th at p. 880.) ““[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the

⁴ The italics were added to the quoted language by defendant in his appellant's
[footnote continued on next page]

defendant as a result of the alleged deficiencies.” [Citation.]” (*People v. Holt* (1997) 15 Cal.4th 619, 703, quoting *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1126.)

Defendant argues the prosecutor’s statements, that defendant did not cooperate with the police or in taking the lie detector test, were extremely prejudicial in that they supported a finding of consciousness of guilt. But we cannot say there was sufficient prejudice to constitute IAC. There was substantial evidence against defendant, and it is not reasonably probable that, had the prosecutor not misstated the evidence, “the result of the proceeding would have been more favorable to the defendant. [Citation.]” (*Burgener, supra*, 29 Cal.4th at p. 880.) We therefore reject his prosecutorial misconduct and IAC challenges founded on the prosecutor’s misstatements that defendant did not cooperate with the police or in taking a lie detector test.

E. Comments on Lesser-Included Offenses

Defendant complains that the prosecutor misstated the law during closing argument by telling the jury he did not request that defendant be charged with the lesser included offenses; “[t]hey are not my request. If I wanted those charges, I would have put them before you. They are there for your consideration because that man is entitled to them. [¶] Don’t be confused by them, is what I am suggesting. Obviously, His Honor will spell it out so you understand it a little clearer, but you may see more back there than what you thought you had.”

[footnote continued from previous page]
opening brief.

Defendant argues the prosecutor's statement that defendant, and not the prosecutor, requested instruction on the lesser-included offenses was prejudicial in conveying to the jury that the lesser-included offenses were not important since defendant requested them, whereas in actuality the court was required to instruct sua sponte on the lesser-included offenses because there was substantial evidence supporting the instructions. (*People v. Breverman* (1998) 19 Cal.4th 142, 159.)

We disagree. While the prosecutor did not mention that the court was required to give the lesser-included offense instructions sua sponte, the prosecutor's statements were not inaccurate. The prosecutor correctly stated that the instructions on the lesser-included offenses were given because defendant was entitled to them and were not requested by the prosecution. There was substantial evidence supporting the lesser-included offenses. There was no prosecutorial misconduct, and even if there was, it was not prejudicial.

We further note that any such error could have been easily corrected by an admonition, had defendant objected. Also, there was no IAC since counsel's failure to object did not fall below the level of reasonably effective assistance, and we cannot say that counsel's failure to object prejudiced defendant's case. (*Burgener, supra*, 29 Cal.4th at p. 880.)

F. Defendant's Fifth Amendment Right

Defendant argues that the prosecutor misstated the law during closing argument by implying that, when he exercised of his Fifth Amendment privilege and testified that he did not commit the charged offenses, he had the choice of testifying further in greater detail and chose not to do so. Defendant asserts this was untrue. By testifying, he

waived his Fifth Amendment privilege and left himself open to cross-examination, but the prosecution chose not to cross-examine him.

Defendant objects to the prosecutor's following closing argument: "Defendant had a choice, an absolute choice under the Fifth Amendment of the Constitution to testify or not. [¶] That is his right. It's personal. He chose to exercise it. After two years it took him less than two seconds to give you his response to what (Jane) has said about him. Less than two seconds. No. And then he sat down. And then he sat down. [¶] That is his choice, whether or not he says anything further of his own volition. [¶] It is your choice whether or not you believe that at all. How that was presented affects your decision on his credibility. Whether you believe that man." Defendant complains that the prosecutor urged the jury to find defendant's testimony not credible based on a comparison between Jane's lengthy, detailed testimony and defendant's extremely brief, general testimony simply denying he committed the offenses.

In response, defense counsel argued during closing argument that defendant's brief direct examination was a tactical decision: "Mr. Lafferty [the prosecutor] . . . made light of this situation because Jeff didn't spend hours and hours and hours on the witness stand. We make tactical decisions, we make decision after discussing them, . . ."

The prosecutor then argued in rebuttal that "Counsel said there is no details. You heard plenty of details from a child who could have only experienced the things she described. [¶] Her testimony. Her three hours of testimony. I found it odd defense counsel said right at the beginning, the whole story has to come out. . . . But then he tells you it was a tactical decision, that his client said no more than one word." The

prosecutor further argued a little later: “You have had the truth exposed to you. I believe you have had the truth exposed to you by virtue of Jeff Lungberg sitting up here and saying only one word. Only one word.”

Defendant argues that, while it was proper for the prosecutor to comment on matters affecting defendant’s credibility, the prosecutor crossed the line by inaccurately implying defendant’s exercise of his Fifth Amendment right to testify left him with the additional choice of not saying anything other than his brief testimony denying the charges. To the contrary, defendant asserts, because defendant waived his Fifth Amendment privilege by testifying, he left himself open to being cross-examined. (*Johnson v. United States* (1943) 318 U.S. 189, *People v. Mayberry* (1975) 15 Cal.3d 143, 160; *People v. Wilson* (2005) 36 Cal.4th 309, 355.)

Defendant also complains that the prosecution’s rebuttal argument constituted unfair sandbagging because defendant did not have an opportunity to respond. In addition, an objection to the prosecutor’s closing argument would have been futile since the brevity of defendant’s testimony could not be changed. It was brief because the prosecutor did not cross-examine defendant.

We conclude there was no prosecutorial misconduct. The prosecutor’s remarks were proper. They did not violate defendant’s Fifth Amendment rights or misstate the law. Defendant waived his right to remain silent under the Fifth Amendment by testifying. Defendant provided very brief testimony. He simply denied the charges. He could have elaborated but chose not to. Apparently, defendant thought the prosecution would cross-examine him, thus allowing him to elaborate further, but the prosecution

unexpectedly did not do so. The prosecutor's comparison of defendant's brief, general testimony with Jane's lengthy, detailed testimony was not improper in arguing Jane's credibility versus that of defendant.

There was no unfair sandbagging, as defendant claims. The prosecutor was not required to cross-examine defendant, and the prosecutor appropriately raised the credibility argument, concerning the length of defendant's and Jane's testimony, in his initial closing argument. Defense counsel responded by claiming defendant's brief testimony was merely a tactical decision. During rebuttal, the prosecutor again argued that defendant's brief testimony, as opposed to Jane's lengthy, detailed testimony, showed that defendant should be believed. Such argument was permissible.

The prosecutor also did not misstate the law by indicating defendant chose not to state anything, other than his brief testimony. This was true. Defendant chose not to testify in detail regarding the charges. Defense counsel noted this was a tactical decision.

Defendant argues the prosecutor's argument implied defendant could not be required to say anything else, such as through cross-examination. But this is not what the prosecutor stated and it is sufficiently clear that the prosecutor was referring to defendant's choice in deciding what to say during direct examination. Defense counsel understood this. He responded by arguing the length of defendant's testimony was a tactical decision.

The prosecutor did not misstate the law or violate defendant's Fifth Amendment rights by noting that defendant chose not to say anything other than his very brief testimony, in which he denied molesting Jane.

4. Disposition

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

s/Gaut
J.

We concur:

s/Ramirez
P. J.

s/Hollenhorst
J.